

Global Trends in Mediation: Riding the Third Wave

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Résumé

Ce chapitre est destiné à décrire le cadre de travail des articles nationaux présents dans les chapitres suivants. L'auteur a, sur la base des données et analyses critiques que ces différents articles contiennent, opéré la synthèse des principales questions et souligné leur caractère systémique en terme de différence et de tendance globale.

Il lui a fallu pour se faire identifier les différences majeures entre les pays de common law et ceux de droit civil au stade du développement de la pratique de la médiation en terme de question structurelle, de processus et de résultat.

Au sein des questions récurrentes au niveau de la structure de la médiation, l'auteur examine comment le cadre réglementaire – à savoir, la procédure civile, la politique gouvernementale, la détermination des tarifs, les règles sur la médiation et les médiateurs – a un impact sur la mobilisation autour de la médiation et sur sa pratique au quotidien.

En ce qui concerne le processus de médiation, l'auteur est d'avis que les disparités non négligeables existantes entre certaines pratiques et le concept théorique de la médiation sont un des plus importants défis en terme de qualité pour le futur de ce mode de résolution des litiges. Selon lui, le fossé entre la théorie et la pratique est particulièrement prononcé dans les médiations liées à un tribunal où avocats et juges interviennent dans le processus.

En terme de résultat, une des questions fondamentales reste la manière par laquelle les objectifs de la politique de médiation judiciaire – à savoir, l'amélioration de l'accès à la justice, la réduction des délais d'attente et l'augmentation de la satisfaction des justiciables – auront été atteints.

Pour terminer, l'auteur examine les tensions liées à l'opposition existant globalement entre diversité et cohérence de la médiation dans le cadre dégagé par l'analyse de la structure, du processus, et du résultat des tendances modernes de ce mode de résolution des disputes.

1. Introduction

Mediation is a process, which is both new in terms of its emergence in the legal arena and old in terms of its timeless universality. For this reason, there is a need at the very outset of this chapter to distinguish modern mediation from traditional forms of dispute resolution¹ and other settlement forms such as justices of the peace, *juges de paix*, *Schiedsmänner*, *conciliation courts* and the settlement function of civil law judges. Modern mediation refers to a movement that began in the 1970s in the USA, in the 1980s in Australia and the UK and in the 1990s in much of civil law Europe and South Africa. Unless otherwise stated, an interest based or facilitative definition of mediation is used throughout this book. In other words, mediation refers to a process in which an impartial third party facilitates a negotiation between two or more disputing parties. Conciliation can be similar in many ways to mediation yet it differs in one important respect. Conciliation refers to a mediation like process in which the impartial third party, the conciliator,

1 On the earlier forms of consensus based dispute resolution, or mediation in traditional communities such as the Nuer in Sudan and the Ndendeuli in Tanzania, see A. Holtwick-Mainzer, *Der übermächtige Dritte: Eine rechtsvergleichende Untersuchung über den streitschlichtenden und streitentscheidenden Dritten*, (Berlin: Duncker & Humboldt GmbH, 1985) at 40; P. Gulliver, "Dispute Settlement Without Courts: The Ndendeuli of Southern Tanzania", in L. Nader, (ed.), *Law in Culture and Society* (Chicago: University of California Press, 1969) at 24.

is able to provide the parties with legal information and/or suggest solutions to the parties. In other words, conciliators can be much more directive and interventionist than interest based mediators. Of course, the lines are quick to blur in practice as the following national chapters demonstrate. Nevertheless the distinction between mediation and conciliation is important and forms the basis of understanding upon which the following chapters are written. While the focus of this book is primarily on mediation, a number of chapters also deal with conciliation. In general, these chapters represent jurisdictions in which mediation has begun to develop under the umbrella of existing conciliation and/or arbitration infrastructure.²

From its modern rebirth in the western world, mediation has travelled a winding and oftentimes challenging path through common law and then civil law countries. Suggestions that mediation would be nothing more than a short lived fad have been short lived themselves. At the same time, many critical questions about mediation process, mediation structures and environment, and mediation outcomes have yet to be explored from global and comparative perspectives.

2. Comparative and Global Perspectives

The civil law/common law dichotomy has long held a fascination for comparative lawyers. While some writers maintain that strong differences have always existed between these two legal traditions, others challenge these traditional beliefs on the basis that the perceived differences are far more illusory than real.³

Indeed, there was once a time when common law and civil law jurisdictions were considered to be so divergent that the value of learning from the experiences of the other was critically questioned and even doubted. With increased travel, telecommunications, rapid globalisation and the recognition of transnational legal issues, these times have well and truly passed. Moreover, mediation is a universal process that has the ability to transcend legal norms and systemic differences. Forms of mediation can be traced back to

2 See, for example, M. Petrovic, "Mediation and Conciliation in Yugoslavia", Part 1), in this volume.

3 See, for example, A.J. Cannon, "Comparisons of Judicial and Lawyer Resources to Resolve Civil Disputes in the Civil Code and Common Law Methods" *JJA* 245 et seq; R. Sacco, "Legal Formants: A Dynamic Approach to Comparative Law" (1991) 39 *Amer J Comp L* 1 at 3; and A. Marfording, "The Fallacy of the Classification of Legal Systems: Japan Examined", in V. Taylor, (ed.), *Asian Laws Through Australian Eyes*, (Sydney: Law Book Company, 1997), at 65.

traditional communities in Asia and Africa,⁴ to the Bible⁵ and to the fourteenth Century English *Mediators of Questions*.⁶

Universality notwithstanding, national legal-political structures and cultural attitudes to conflict and dispute processing can vary dramatically from nation to nation. These differences invariably impact upon how mediation is viewed and applied in both theory and practice. They signal caution to those planning or, indeed, attempting the transplantation of mediation processes from one legal system to another.

While much has been written about mediation in general, international comparative literature is scarce. In terms of common law/civil law comparisons, there is a very small number of comparative studies involving civil law countries, no doubt because the mediation phenomenon is still in its infancy in these jurisdictions.

The aim of this chapter is to establish a conceptual framework for the national chapters that follow. In doing so I will draw upon the wealth of data and critical analysis contained in the national chapters – synthesising the main themes and highlighting systemic patterns in terms of national differences and global trends. The countries covered in this volume embrace both common and civil law traditions, namely,

- the common law jurisdictions of Australia, England, Wales and the USA,
- the civil law jurisdictions of Austria, Belgium, Denmark, Germany, Italy, the Netherlands, Poland, Switzerland and Yugoslavia, and
- the mixed legal jurisdictions of South Africa, Canada and Scotland.

While there are many more countries throughout the world experiencing the impact of the growth of mediation, it has not been possible to include all of them in this volume. The selection of national jurisdictions in this volume lends itself to a civil law/common law comparison within a global context. It is within this context that the term *global* is used throughout this volume.

4 On the application of mediation in China and the Asian region, see D. Bagshaw, "China: Mediation in Divorce is an All-In Affair Now" (1995) 2 *Australian Lawyer* 24. See also H. Gallagher, "The Eastern Approach" (1995) 69 *Law Institute Journal* 64; T. Krapp, "Zivilrechtliche Schlichtung an japanischen Gerichten", in W. Gottwald and D. Strempel, (eds.), *Streitschlichtung: Rechtsvergleichende Beiträge zur aussergerichtlichen Streitbeilegung*, (Köln: Bundesanzeiger, 1995) at 77.

5 See Matthew 5.1-9; Timothy 2.5-6; The Corinthians 6.1-4.

6 On traditional community forms of dispute management generally, see Note 1.

3. Mediation and the Third Wave

In 1976 the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (better known as the Pound Conference) took place in Minnesota, USA. It addressed issues relating to the perceived crisis in access to justice.⁷ At the conference Professor Frank Sander introduced his now well known concept of the multi-door courthouse in which the doors represent the various dispute resolution options to which disputants entering the courthouse can be referred. The multi-door courthouse represents an institutionalised approach to ADR, where ADR is mobilised and ultimately managed by the courts. On the other end of the spectrum is the community approach to ADR, which envisages ADR centres independent of the institutions of the legal system located in the local community and catering to disputants needs at a grass roots level.

At the same time as Americans were debating the issues and ideas emerging from the Pound Conference, similar voices of dissatisfaction were making themselves heard on the other side of the Atlantic. During the 1970s the Florence Access to Justice project⁸ brought together academics from around the globe to debate the legal, political and social issues relating to access to justice.

Cappelletti and Garth introduced the highly visual wave metaphor to describe the access to justice movement, first as it related to the USA and second as it related to other countries throughout the western world. The first wave, beginning in the 1960s, introduced institutions such as legal aid in order to address the economic obstacles of access to justice such as inability to access information and representation; the second wave, beginning in the early 1970s, addressed organisational obstacles, which gave voice to the phenomenon of collective group rights and interests via the introduction of class actions; the third wave, beginning in the late 1970s, has seen the emergence of Alternative Dispute Resolution (ADR) processes to address the inadequacy of traditional litigation procedures in accessing justice. Taking up the themes that emerged from the Florence Project, academic writers

7 F.E. Sander, in A.L. Levin & R.R. Wheeler (eds.), *Varieties of Dispute Processing, the Pound Conference: Perspectives on Justice in the Future*, (Massachusetts: West, 1979) at 65. See also R. Birke and L. Teitz, "US Mediation Today: The Path that Brought America to Uniform Laws and Mediation to Cyberspace", Part 2 b) in this volume.

8 The Florence Access to Justice Project was funded by the Ford Foundation, the Italian National Council (CNR) and the European University Institute. See M. Cappelletti, (ed.), *The Florence Access to Justice Project, Volumes I-IV*, (Alphen aan den Rijn, Netherlands and Milan: Sijthoff and Noordhoff Int., 1978).

such as Blankenburg, Galanter and Johnson have continued to debate such issues as the transplantability of institutions from one legal culture to another (particularly common law to civil law) and their visions for the justice system of the future within the broader context of the access to justice movement.⁹ Johnson, for example, speculates on four alternative scenarios for justice in the twenty first century, one of which envisages an expanded role for deformed dispute processing models alongside existing formal models, and others which envisage either extreme levels of privatisation, nationalisation or systemisation.

Now in 2003 we revisit some of the themes developed nearly three decades ago with a specific focus on the so called third wave in the access to justice movement and the role of ADR, specifically mediation and conciliation.

Taking up the wave metaphor, Mistelis contextualises the introduction of ADR in *"the wave of liberalisation and privatisation of public services that swept the western world as well as the so called emerging markets in the late 20th century"*.¹⁰ ADR processes are now recognised not only as a distinct system of dispute resolution but also as a system that interacts interdependently with the justice system. Indeed, the concept of the third wave was never intended to replace the first and second waves. Rather it would move beyond the essentially legal orientation implicit in the first and second waves to embrace a new paradigm. This interdependence with current legal structures is most clearly demonstrated in the context of court related mediation, which is increasingly seen as an effective way to increase access to, participation in, and satisfaction with the way legal disputes are resolved. In terms of legal practice and legislative activity, mediation is arguably the fastest growing form of ADR in the world. ADR provides a different approach to and a different sort of justice for solving disputes. Cappelletti calls it co-existential justice.¹¹ He further notes that ADR processes are themselves not

new; rather that various stakeholder groups such as the judiciary, disillusioned lawyers, reform minded legislators, unsatisfied litigants, social workers, psychologists, businesses, lobby groups and governments have identified new reasons for the need and utilisation of ADR.¹² Reasons behind the new wave of interest in mediation processes include:

- the recognition of the alienating effects on community that accompany the overregulation and legalisation of disputes,
- the globalisation of law in relation to the internationalisation of consumer and environmental protection laws and of trade,
- the increasing self regulation of certain industry groups, particularly in the banking, financial and commercial sectors, and
- socio-cultural changes such as the decline of the culturally homogenous nation state, the increasing pluralisation of societal value systems and the emerging role of women in the workplace.

In conflict resolution contexts legal and political systems are being challenged to offer a more diverse and flexible range of dispute resolution methods that include cooperative and interest based negotiation approaches to decision making.

4. Global Trends and National Nuances

Mediation has grown rapidly in many common law countries such as USA, Australia, Canada, England and Wales since the 1970s and 1980s. The current state of mediation practice in most common law countries can be traced back to the establishment of community justice centres in the 1970s and 1980s. Meanwhile, mediation is also practised in the private sector as well as in a wide range of court related programs. In Australia, common law Canadian provinces, England, Wales and the USA, ADR exists in many, if not most courts. As a result no category of legal dispute is excluded from the potential application of ADR, and in particular, mediation.

In contrast, civil law countries have displayed, until recently, a greater reluctance to embrace the practice of mediation to resolve legal disputes. Compared with the common law experience, mediation in countries such as Germany, Austria, Quebec, Denmark, Belgium, Scotland, Germany, Italy, Poland, Switzerland and Yugoslavia have travelled, and are still travelling, a more difficult and winding path to recognition as a legitimate and valuable

⁹ See, for example, their contributions in M. Cappelletti, (ed.), *Access to Justice and the Welfare State* (Le Monnier Florence: Sijthoff & Noordhoff Int., 1981). See also E. Johnson Jr, "The Justice System of the Future", in M. Cappelletti, (ed.), *Access to Justice and the Welfare State*, above Note 8 at 183. Blankenburg, for example, argues that the wave metaphor does not correspond to developments on the European continent: E. Blankenburg in his paper delivered at the Congress on Access to Justice 1979 at the European University Institute, Florence and referred to in M. Cappelletti & B. Garth, in M. Cappelletti, (ed.), *Access to Justice and the Welfare State*, (Le Monnier Florence: Sijthoff & Noordhoff Int., 1981).

¹⁰ L. Mistelis, "ADR in England and Wales - A Successful Case of Public Private Partnership", Part 1), in this volume.

¹¹ See the reference to co-existential justice in G. De Palo and L. Cominelli, "Crisis of Courts and the Mediation Debate: the Italian Case", Part 1 b), in this volume.

¹² See also R. Birke, "US Mediation in the Twenty-first Century: The Path that Brought America to Uniform Laws and Mediation in Cyberspace", Part 2 a) of this volume.

alternative to litigation. Recently, however, the European Union has signalled a strong focus on ADR and, in particular, mediation. It has declared ADR a political priority, published a Green Paper on Alternative Dispute Resolution in Civil and Commercial Law and contributed to the development of online dispute resolution infrastructure.¹³

At this stage, it is useful to point out that not all national chapters confirm these systemic patterns. The cases of the Netherlands and South Africa provide the exceptions. The Netherlands, stemming from a civil law tradition has historically taken a proactive approach in legal reform, borrowing from both civil law and common law jurisdictions. Compared with most other civil law countries, the Netherlands has a well established system of pre-trial conflict handling mechanisms. As a result, mediation developments in the Netherlands have been able to slide into the existing pre-trial structures and mediation has enjoyed success earlier in the Netherlands compared with other civil law countries.¹⁴

South African lawyers essentially apply a common law process to laws drawn from the Dutch civil code. The system is a kind of uncodified civil law, which co-exists with traditional community dispute management such as the *makgotla*. While the legal profession in South Africa has been hesitant to embrace the mediation of civil legal disputes going before the courts, the fall of the apartheid system has opened the entire spectrum of human rights, discrimination, constitutional, environmental and intergovernmental issues to ADR and put mediation very clearly on the South African map.¹⁵

Despite differences in the developmental stages of mediation practice in common law and civil law countries, the common theme of *diversity* versus *consistency* weaves its tension through quality issues related to *structure*, *process* and *outcomes* in mediation.

Recurring *structural* issues include how aspects of the regulatory framework such as civil procedure law, government policy, regulation of fees, laws on mediation and mediators, and mediation referral systems impact upon the mobilisation and actual practice of mediation.

13 See references to the role of the European Union in A.J. De Roo and R.W. Jagtenberg, "The Netherlands Encouraging Mediation", Part 1), in this volume; V. Vindeloef, "Mediation in Danish Law – In Retrospect and Perspective", Part 3), in this volume and L.A. Mistelis, above Note 10, Part 2 b) vi) in this volume.

14 A.J. De Roo and R.W. Jagtenberg, above Note 13, Part 1).

15 M. Paleker, "The Changing Face of Mediation in South Africa", Part 2) in this volume.

The significant discrepancy between some mediation practices (for example, mandatory mediation and evaluative mediation) and mediation theory (for example, voluntary and interest based mediation process) is one of the major challenges facing the future of mediation in terms of *process* quality. The theory/practice gap is arguably more pronounced in court related mediation where lawyers and judges can play a role in the mediation process.

In terms of *outcomes* one of the key issues is the extent to which the policy objectives of court related mediation have been fulfilled. Typical policy objectives include improving access to justice, reducing court waiting lists and increasing consumer satisfaction with the legal system.

Before considering the diversity versus consistency debate in detail, each of the aforementioned sets of quality issues (structural, process and outcomes) will be explored, beginning with the quality outcomes.

5. Mediation Outcomes

It is useful to begin with the end in mind. What outcomes has the introduction of ADR and specifically mediation produced so far? In her chapter on Denmark, Vindeloef challenges the reader to consider the reasons behind the introduction of mediation before judging its success.¹⁶ Indeed, how do we measure success? What are the indicators for a positive outcome?¹⁷ The value of data collected on mediation outcomes depends heavily on the clarity of the objectives set for mediation.

Mediation systems and schemes are usually established in an attempt to fulfil policy goals and objectives, which, in turn, are drawn from a set of core values.¹⁸ For example, one of the values embedded in many court related

16 V. Vindeloef, above Note 13, Part 11).

17 W.D. Brazil, "Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns" (1999) 14 *Ohio State Journal on Dispute Resolution* 715 at 717. On quality of court related mediation programs in terms of achieving and monitoring best practice see T. Sourdin et al, "Court Connected Mediation: National Best Practice Guidelines Draft For Comment", Manuscript, 1994, Centre for Dispute Resolution, University of Technology, Sydney, Centre for Court Policy and Administration, University of Wollongong, in association with the Law Council of Australia, at 31. On the objectives of quality in court related ADR programs see Justice L.T. Olsson, "Mediation and the Courts – Inspiration or Desperation?" (1996) 5 *Journal of Judicial Administration* 236.

18 On values or philosophies of mediation programs in general see S. Breidenbach, *Mediation: Struktur, Chancen und Risiken von Vermittlung um Konflikt*, (Köln: Verlag Dr. Otto Schmidt, 1995) at 119 et seq and 213–246; J. Alfani et al, "What Happens

programs is efficient service delivery in terms of dispute settlement (an example of quantitative justice). Other values may include empowerment of disputants to manage their own conflict (an example of qualitative justice). In order to measure the impact and quality of mediation one must identify the values and objectives of existing mediation systems, and the extent to which the objectives have been achieved and the spirit of the values is being lived.

a) Five objectives of mediation

While the objectives of mediation schemes and projects can broadly be categorised as qualitative or quantitative,¹⁹ significant differentiations emerge when one looks closely at the visions and objectives of such schemes.²⁰ Drawing upon the essays in this volume, a dominant objective of *efficient resolution of disputes* becomes apparent. Efficiency refers to reducing court waiting lists, the workload of the judiciary, costs to disputants, costs to the state sponsored judicial system and reducing the time involved by all relevant parties in resolving a single dispute. An *efficient* dispute resolution system would allow non-mediable matters speedier and therefore (in jurisdictions where lawyers are paid according to time spent on a case) more affordable access to the courts. With their focus on achieving settlements, the models employed in court related programs tend to reflect a legalistic and evaluative style.

In so far as the *efficiency* objective translates to improved access to courts, it overlaps with a second significant objective, particularly found in court related programs – *access to justice*. Access to justice, however, goes beyond access to the courts. As explained in Part 3, it involves empowering parties to overcome economic, organisational and procedural obstacles to justice. Critics argue that mediation does not provide the procedural safeguards of a court and therefore offers second class justice – particularly where an imbal-

When Mediation is Institutionalized?: To the Parties, Practitioners, and Host Institutions" (1994) 9 *Ohio State Journal on Dispute Resolution* 307 at 309; also NADRAC, *A Framework for Standards: Report to the Commonwealth Attorney-General*, April 2001 at 13–14.

¹⁹ On quantitative and qualitative justice, see C. Menkel-Meadow, "Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or 'The Law of ADR'" (1991) 19 *Florida State University Law Review* 1 at 10.

²⁰ See H. Astor, *Quality in Court Connected Mediation Programs: an Issues Paper*, (Carlton: AIIA Inc, 2001) at 5 for a list of different objectives of mediation schemes.

ance in bargaining power exists between the parties.²¹ The argument is even more cogent where mandatory mediation schemes are in place, which effectively force disputants into a forum lacking the procedural safeguards of a court and for which (in many common law jurisdictions) the parties must pay.²² The objectives of efficiency and access to justice are most frequently associated with court related programs.²³

A third objective identified in many mediation schemes is *self determination of the parties*. Here the primary aim of mediation is to provide parties with the opportunity to play a greater role in the management of their dispute by actively participating in the dispute resolution process. Mediation provides a forum for self determination by encouraging parties to identify their needs and interests and those of the other party, generate options that address those needs and interests and accept responsibility for the outcome. In contrast to the *efficiency* objective, the ultimate objective is not necessarily settlement of the dispute; rather it is to empower the parties to work towards a mutually acceptable outcome that reflects both their interests and needs and enables them to negotiate with each other in the future. The mediation model typically employed under the umbrella of this objective reflects the important role of process and relationship in mediation. It is most commonly known in English language literature as facilitative or interest based mediation.²⁴ Self determination is a goal common to many mediation programs, including court related programs, although it receives less focus and priority where efficiency and access to justice are also objectives.

²¹ M. Cappelletti, "Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-to-Justice Movement" (1995) 56 *Modern Law Review* 287 at 288.

²² T. Sourdin, "Mediation in Australia: The Decline of Litigation?", Part 1) and 5 a) i) in this volume; A. Prujiner, "Développements Récents en Médiation au Canada et au Québec", Part 3 b) in this volume and L.A. Mistelis, above Note 10, Part 2 a) v).

²³ On objectives of court related mediation see W. Gottwald, "Modelle der freiwilligen Streitschlichtung unter besonderer Berücksichtigung der Mediation" (1998) 25 *WM Heft, Zeitschrift für Wirtschafts- und Bankrecht* 1257 at 1258; H. Astor, above Note 20 at 5. As to the variability of objectives of ADR between different courts in Australia, see Australian Law Reform Commission, *Review of the Adversarial System of Litigation: ADR – its Role in Federal Dispute Resolution*, Issues Paper 25 (1998).

²⁴ N. Alexander, *Wirtschaftsmediation in Theorie und Praxis: Eine deutsch-australische Studie*, (Frankfurt am Main: Peter Lang, 1999) at Chapter 2; L. Boulle, *Mediation: Principles, Process, Practice*, (Sydney: Butterworths, 1996) at 29; C.W. Moore, *The Mediation Process – Practical Strategies for Resolving Conflict*, (San Francisco, California and Colorado: Jossey-Bass Inc., 1996) at 107–108.

A fourth objective found in mediation programs is *transformation* of the way that parties relate to each other. This objective overlaps to some extent with the values of self determination. A major difference is that the focus is not on individual interests but rather the relationship between the parties. The objective is to empower the parties to transform the way they relate to each other and move them towards some sort of reconciliation. Implicit in the goal of transformation is the concept that parties will transcend their own self interest and embrace the meta interest that links them to each other. In other words, the aim is for parties to develop a shared perception of their relationship, which will lead to changes in how they interact with each other. Transformative or therapeutic models of mediation typically are applied in family, victim offender and community mediation centres.

Finally, the community mediation movement, which, at least in most common law countries (see, for example, USA, Australia and England) was the forerunner to court related and other forms of institutionalised mediation, also embraces the goal of transformation. In the grass roots community movement the term *transformation* goes beyond the aim of transformation of the relationship between the disputing parties to embrace the long term objective of transformation of the community – *social transformation*. Social transformation of the disputing culture of a community involves bringing back ownership and responsibility for conflict management to the community. The focus is on the community as a whole rather than the disputants themselves. The interests of the community take priority over individual interests.

Client satisfaction is often promoted as a criterion for measuring the success of mediations and mediation schemes. Yet client satisfaction is itself a very subjective concept and can correspond to any of the objectives listed above.²⁵ For example, the parties' level of satisfaction may correspond to the need for a speedy and inexpensive dispute resolution process or a need for self determination. Accordingly, the clarity of qualitative research such as party satisfaction would be better served by specifying the aspect of the process at which the satisfaction is directed.

Mediation schemes may embody both qualitative and quantitative objectives depending on the source of funding and stakeholder support.²⁶ For example:

25 D. Luban, "The Quality of Justice" (1989) 66 *Denver University Law Review* 381 at 405.

26 For example, s 94 of the *Supreme Court of Queensland Act 1991* (Qld) sets out the following objectives of the ADR processes (which specifically include mediation): to — assist parties to achieve negotiated settlements and satisfactory resolutions of disputes,

- efficiency objectives (quantitatively measured) might be combined with self determination objectives (qualitatively analysed),
- access to justice objectives (quantitatively and qualitatively analysed) might be combined with (social) transformation objectives (qualitatively analysed).

In this context it is useful to consider the motivations and interests of the stakeholders involved.²⁷ Stakeholder values and interests inform the visions and objectives of mediation schemes. The range of stakeholder groups that have played a role in the development of ADR worldwide (such as the judiciary, lawyers, social workers, psychologists, litigants and governments) and their diverse interests and motivations have been canvassed earlier (see above Part 3). The fact that stakeholder interests differ does not necessarily mean that they must compete. They are, in fact, interrelated. Yet a reading of the national chapters indicates that as long as mediation schemes are sponsored by one stakeholder group only or stakeholders with overlapping interests, their objectives will prioritise certain interests at the expense of others. Moreover, particularly in court related mediation schemes, quantitative data appears to have a greater impact on decision makers than qualitative data and therefore quantitative objectives frequently take priority.

The essays in this volume indicate that the more highly regulated the ADR industry (i) the more likely the mediation objectives in various schemes will compete rather than complement one another and (ii) the greater the proliferation of schemes promoting efficiency and access to justice as their primary objective. Current reality seems to be that funding shortages frustrate attempts to establish a regulatory framework that encourages the promotion of a range of mediation objectives and measures the extent to which those objectives are met.²⁸ In Lower Saxony, Germany, for example, an attempt is being made to achieve a range of quantitative and qualitative objectives on a state wide basis within the context of voluntary court related mediation. The vision of the Lower Saxony project is to transform the disputing culture, so that in the long term higher client satisfaction with the quality of dispute resolution further enhances its quantitative efficiencies.²⁹ Anecdotal evi-

to improve access to justice for litigants, to reduce cost and delay in the court system, and to allow the specified ADR processes to be conducted as quickly, and with as little formality and technicality as possible.

27 On this point see N. Alexander, W. Gottwald & T. Trenczek, "Mediation in Germany: The Long and Winding Road", Parts 4 b) and 5 c) in this volume.

28 N. Alexander, W. Gottwald & T. Trenczek, above Note 27, Part 2 e); V. Vindeloef "Mediation in Danish Law – In Retrospect and Perspective", Part 11), in this volume.

29 N. Alexander, W. Gottwald & T. Trenczek, above Note 27, Part 2 a) viii).

dence suggests that maintaining funding for the project will be an ongoing challenge for the stakeholders involved.

b) Practice outcomes in mediation

As global interest in mediation increases, policy makers, practitioners and theorists alike are urgently seeking the results of the collation and evaluation of empirical data.³⁰ While most national chapters indicate empirical research is being undertaken on a local basis and in some cases a national basis, funding continues to be an issue, which, in turn, may jeopardise the ability to generate useful and valuable data. Moreover, without comprehensive national data, international comparative research remains difficult.

Research findings currently available (mostly in common law jurisdictions) comprise the first round of empirical research in the field.³¹ The findings primarily relate to court related mediation schemes, family mediation and victim offender mediation programs. In general, findings indicate a correlation between the level of plaintiff satisfaction and the type of dispute resolution process used, so that plaintiffs' satisfaction with the process increases with their participation in the process. The findings also indicate a high rate of agreement reached by parties at mediation and a high level of satisfaction with the fairness of the process. At least one US study, however, was unable to show any significant effect of mediation on the cost and time in-

involved in settling disputes, or on party satisfaction and views of fairness. Empirical research is not convincing on the question of whether court related mediation alters the ratio between cases tried and settled. What the research does suggest is that cases settled are now being settled earlier than usual and in a more structured way through mediation, thereby reducing the costs and time involved in case management and freeing up the courts to hear cases promptly.³² In Australia, for example, Sourdin refers to a decline in the civil workload of the superior courts.³³

In terms of victim offender mediation outcomes, a number of civil law countries have more programs, experience and research results than their common law counterparts.³⁴ Victim offender mediation appears to have developed as a separate and earlier movement to civil mediation, at least on the European continent.

The research to date can be drawn upon and its lessons usefully applied throughout the development, experimentation and evaluation phases in countries with less experience in mediation. Of particular significance is the point that learning from global research is not a one way street. While common law jurisdictions may have moved ahead with mediation in an overall sense, there is much to be learnt from specific continental research outcomes especially in terms of judicial mediation models, victim offender mediation and to a lesser extent family mediation. Furthermore, the application of mediation principles in the field of intergovernmental disputes and human rights in South Africa can provide valuable insights in terms of policy design and implementation principles.

With respect to mediation models used in practice, empirical data is scarce. The national chapters suggest a correlation between professional or discipli-

30 E. Blankenburg & J. Stock, *Endbericht: Sekundäranalyse der Literatur zur außergerichtlichen Streitbeilegung*, (Basel: Bundesministeriums der Justiz, 1999).

31 On Australian research see, for example, NADRAC, *A Framework for ADR Standards*, Report to the Commonwealth Attorney-General (April, 2001) at <http://www.nadrac.gov.au/WWW/PUTERESOLUTIONHOME.nsf/AllDocs/704CA7BEC721D2B0CA256BC100121327?OpenDocument&highlight=adr%20statistics>, last visited 13.05.03; on court related mediation research findings see: *Australia*: Supreme Court of Queensland Annual Reports found at <http://www.courts.qld.gov.au/publications/annual/default.htm>, last visited 13.05.03; Supreme Court of New South Wales Annual Review found at http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/ar_index, last visited 13.05.03. *Canada*: A. Prujiner, above Note 22, Part 2; also G. Hazel, "Court-based ADR Initiatives for Non-Family Civil Disputes: and Evaluation of the Ontario Mandatory Mediation Program", found at http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/exec_summary_recommend.pdf, last visited 13.05.03. *United States*: R. Birke & L. Teitz, above Note 12, Part 2 a). *England*: L.A. Mistelis, above Note 10, Part 2 a) & 2 c) i); see also "The Commercial Court and the Court of Appeal", found at http://www.courtservice.gov.uk/docs/using_courts/guides_notices/comm/adr_civ_disp.pdf, last visited 13.05.03; J. Kakalik et al, *An Evaluation of Mediation and Neutral Early Evaluation under the Civil Justice Reform Act*, RAND (California: Santa Monica, 1996) 53.

32 For a comparison of several United States court connected mediation programs, see S. Clarke and E. Gordon "Public Sponsorship of Private Settling: Court Ordered Civil Mediation" (1997) 19 *JSJ* 311. Clarke and Gordon's research indicated that the significant effect of those programs was to make cases that would have settled anyway, settle earlier.

33 T. Sourdin, above Note 22, Part 1).

34 See, in particular, N. Alexander, W. Gottwald & T. Trenczek, above Note 27, Part 2 a) i). See also the references to victim offender outcomes in C. Matl and A. Prokop-Zischka, "Mediation in Austria", Part 4 e) in this volume; J. Laenens, "Règlement Alternatif Des Litiges En Belgique", Part 3) in this volume; V. Vindelev, above Note 28, Part 3); G. De Palo and L. Cominelli, above Note 11, Part 3 c); J. Jankowski, "La Conciliation et la Médiation en Droit Polonais", Part 2 b) in this volume; M.L. Ross, "Mediation in Scotland: An Eluded Opportunity?", Part 4 a) in this volume and I. Meier, "Mediation and Conciliation in Switzerland", Part 3 g) in this volume.

nary background of mediator and mediator style. Lawyers tend to mediate on the evaluative end of the spectrum, while social scientists such as psychologists and counsellors are more likely to be found on the facilitative or transformative end. Is there a correlation between mediation process model used and client satisfaction? While there is much theoretical and anecdotal speculation on the point, there appears little evidence to support this apart from the self reporting of mediators themselves.

To what extent, therefore, has empirical research confirmed the qualitative advantages of mediation as stated in mediation theory? The first round of empirical research has delivered mixed results. In order to achieve greater clarity and value from research, a greater level of funding is required to establish sophisticated research programs to encompass both the qualitative and quantitative as well as longitudinal and comparative design measures.

The national chapters further suggest that the supply of mediators continues to outweigh the demand for mediation services in a free and non-regulated market. A strong indicator of this phenomenon is that the training industry in mediation has boomed far more quickly than the provision of mediation services.

6. Process Quality in Mediation

Mediation practice in common law countries has developed more rapidly than theory, thereby creating a distinct gap between theory and practice. It seems that mediators, whether or not they have undergone accreditation training, tend to mediate in a manner that reflects their previous profession, whether as lawyers, engineers, social workers, psychologists or academics.³⁵ All over the world, practice models reflect:

- the nature of training,
- the professional background of the mediator, and
- the legal and organisational structures within which mediation is conducted.

In court related mediation programs, common law experience and early civil law indicators warn of the risk that mediation practice, particularly in schemes that do not specify mediation values and specific process requirements, will look nothing like the theory. In concrete terms this means that the early literature and training on mediation process (primarily interest

based and transformative) have informed only a section of the mediating population – the section, which apply mediation as an interest based, client empowering process.³⁶ As part of the move to bridge the gap, mediation programs need to assume a greater responsibility for the service they are offering by making an informed choice about process quality and communicating this choice to their customers – the referral agencies and the parties themselves.

The impact of the regulatory framework within which mediation operates on the mediation process itself will be addressed next.

7. Structural Issues that Impact on Mediation

A number of scholars emphasise the influence the mediator has over the mediation process. Yet the mediator must work within the framework of a legal system. This framework determines how mediation is interpreted and applied by mediators, dispute management professionals such as lawyers, and by clients. The framework defines mediation and has a direct impact on how it is practised. Court referral schemes vary in terms of selection and remuneration of mediators, training of mediators, manner of referral and reporting procedures. Each of these factors has a direct impact on the nature of the mediation process.

The differences between the operation of mediation in civil and common law countries are based largely on structural issues. Structural issues are most valuably addressed in the context of the legal system in which the structures are embedded. They refer to the supply side of legal behaviour which Blankenburg describes as “*a set of institutional arrangements and patterns of professional interaction*”.³⁷ In this Part I will specifically address the regulatory framework within which mediation operates, existing mediative elements within the current framework and how mediation is being mobilised.

a) The regulatory framework within which mediation operates

The political push to utilise mediation as a means to increase access to justice has not occurred in civil law countries to the same extent or in the same manner as it has in common law countries. The emergence and develop-

³⁵ See also Part 8 b) in this chapter on the professionalisation tension.

³⁶ See also Part 8 c) in this chapter on the process tension.

³⁷ E. Blankenburg, “Civil Litigation Rates as Indicators for Legal Cultures”, in D. Nelken (ed.), *Comparing Legal Cultures* (Dartmouth, Aldershot: England, 1997).

ment of mediation in the common law jurisdictions represented in this volume has occurred as a result of pressure on politicians and governments to respond to an inefficient, protracted and, for most citizens, unaffordable and highly unsatisfactory litigation process. By comparison, civil legal systems can be significantly more attractive for consumers than common law jurisdictions. The German system, for example, is less expensive due to the fees and cost structure as well as the availability of legal costs insurance. Courts have shorter waiting lists and trial time is less. "*Clients (disputants) of the German legal system have not suffered the same level of inability to access justice as did their Anglo-American counterparts prior to the introduction of court related mediation systems*".³⁸ In the same vein Laenens comments on the difficulty of comparing mediation developments in the USA with those of Belgium because Belgium has not experienced the level of litigation crisis as has occurred in the USA. In this context he also points to the role of the civil law judge as conciliator/mediator.³⁹ In Italy, on the other hand, an inexpensive litigation process is described as tortuously inefficient with the result that disputants, while they can afford to litigate, are unsatisfied with the process.⁴⁰ The authors of the chapters on the Netherlands and Denmark point out that the mediation movements in their countries were influenced by the worldwide Gandhi inspired peace movement as well as ADR developments in the USA.⁴¹ In the Netherlands a system of pre-court filtering institutions has complemented a court system that would otherwise be inaccessible to many.⁴²

The ability of the courts in Australia and the USA to change their court rules is in stark contrast to the legislative monopoly over court rules in most civil law countries.⁴³ This structural feature has enabled common law courts to integrate mediation into the litigation process on a court by court basis. Sourdin, for example, makes the point that a form of court related mediation is to be found in virtually every court and tribunal in Australia.⁴⁴ A strict regulatory control over court rules puts the brakes on change and experimentation unless and until the legislature sees fit to allow and encourage it.

38 See N. Alexander, W. Gottwald & T. Tenczek, above Note 27, Part 5 c).

39 See J. Laenens, above Note 33, Part 2).

40 See G. De Palo and L. Cominelli, above Note 11, Part 1).

41 See V. Vindeloef above Note 28, Part 1) and A. J. De Roo and R. W. Jagtenberg, above Note 13, Part 1).

42 See A. J. De Roo & R. W. Jagtenberg, above Note 13, Part 1).

43 See, for example, N. Alexander, W. Gottwald & T. Tenczek, above Note 27, Part 3 c).

44 T. Sourdin, above Note 22, Part 5).

Germany provides us with an example of how the federal legislature has provided for change and some flexibility in court rules.⁴⁵ Of course court related mediation initiatives may exist in common law and civil law jurisdictions on a voluntary and informal basis without enabling legislation. Such pilot programs have enjoyed limited success as they have been dependent on individuals to drive them and frequently do not have resources to promote and support them.⁴⁶

Accordingly, while factors such as litigation cost structures, efficiency of litigation processes, legal costs insurance and ability to regulate court rules have contributed to the later move to mediation in civil law jurisdictions, these *litigation factors* do not provide the only reasons behind the 10 to 20 year gap in the mediation movements of common law and civil law countries. There is no simplistic distinction between the structural frameworks of civil law and common law jurisdictions. Yet it is clear that the complex interplay of features of the existing regulatory frameworks impacts on the ability of mediation to be integrated into legal structures. The common theme that emerges from the national chapters is that mediation as a movement and as an institution begins to grow only when the political voices of the day express an urgent need to overhaul and remedy the inadequacies of the existing judicial system such as excessive cost and delay. In this context, it is no surprise that mediation success in common law jurisdictions has often been measured by quantitative indicators such as settlement success rate and reduction in court waiting lists.⁴⁷ Does it then not follow that mediation must take a somewhat different path in civil law countries? Is it possible that mediation is fulfilling, at least in part, different needs in civil and common law jurisdictions? In this context Vindeloef refers to the statement of the Danish Minister for Justice in 2002 that the economic advantages of mediation are secondary to the "*more substantial*" qualitative advantages of the process.⁴⁸

b) Existing mediative elements within the framework

While advocates of the modern mediation movement are quick to distinguish mediation from judicial settlement and community conciliators such

45 See, for example, N. Alexander, W. Gottwald & T. Tenczek, above Note 27, Part 2 a) viii).

46 See, for example, N. Alexander, W. Gottwald & T. Tenczek, above Note 27, Part 2 a) viii).

47 See, for example, L.A. Mistelis, above Note 10, Part 2 a) v).

48 V. Vindeloef, above Note 28, Part 11).

as *juge de paix*⁴⁹ and *Schiedsleute*⁵⁰, conciliatory and mediative elements existing within and on the fringes of a legal system have continued to influence the development of mediation on a jurisdictional basis.

A comparative illustration of Dutch and German legal cultures provides a useful starting point. Based on civil litigation rates, the Dutch are considered litigation averse and the Germans highly litigious. A closer examination of the Netherlands, however, reveals the high use of pre-court filtering institutions, many of which have a mediation or conciliation component. This factor, combined with the Dutch loose lawyer monopolies and unpredictable cost recovery means that fewer cases go to court in the Netherlands than in Germany. In contrast the German legal system is highly accessible and predictable in terms of time frame and costs. Not surprisingly it is well patronised.⁵¹ Accordingly, there may be very little difference in the disputing attitudes of Dutch and Germans but a large difference in access to the courts and available alternatives.

A significant mediative element in the civil law context is the judicial settlement role of the judge. The settlement function takes place within the courtroom and is conducted by the judge who will directly hear the matter if no settlement is reached. It differs from modern mediation in a number of ways. First, judicial attempts to encourage parties to settle have been shown to be very legalistic and interventionist. Second, the fact the same judge will hear the case forthwith that if the parties do not settle places the judicial settlement function a world apart from court related mediation in most common law jurisdictions. In fact, if a civil law judge were to conduct a facilitative mediation with private sessions, adjudicating the same matter would pose a significant ethical dilemma and compromise the rules of natural justice. Third, the parties knowing that the immediate effect of non-agreement is a legal hearing with the same third party, would be reluctant to engage in the full and frank discussion so integral to the mediation process. Finally, the settlement function of a judge must be consistent with the overall objective of the judicial role, namely to find a legal solution for the disputants. Therefore, even while exercising their settlement function, civil

law judges are required to lead parties towards a solution consistent with the relevant legal norms.⁵²

The civil law judicial model has nevertheless impacted on the development of court related mediation. The case of Canada provides a useful illustration. Prujiner describes the two models of court related mediation that exist in Canadian civil courts. The first one is a mediation elected by the parties within the court proceedings, without costs and before a judge who will *not* be the judge at the trial if the mediation does not succeed. This is mediation within the courts. The parties usually must agree to the mediation, but they do not have the choice of the mediator and do not have to pay. This model (*the justice model*) is predominant in the new Code of Civil Procedure of Québec. The second model is a mediation referral by the Courts, sometimes mandatory, sometimes requiring the consent of the parties. The mediator is usually selected by the parties from a panel of accredited professional mediators. These mediators are usually paid directly by the parties, but public funds are available in limited circumstances. In some instances mediator fees are subject to regulation. This model (*the marketplace model*) is favoured in the common law provinces, mainly Ontario and Saskatchewan.

While it is true that a variety of models exist in all jurisdictions, the justice model is more frequently found in civil law jurisdictions and the marketplace model in common law jurisdictions. The justice model envisages mediation as an extension of the service of the courts, and even where the mediations are outsourced to external mediators, the justice system bears the cost. Conversely, the marketplace model extends the arm of the court into the private sector and has contributed to the creation of a new industry – private court related mediation.

As common law countries have integrated elements of civil law procedures such as judicial case management and judicial settlement into their own courts and tribunals, there has been a corresponding introduction of elements of the justice model of mediation into those courts.⁵³

Opponents of modern mediation in civil law countries have pointed to the settlement function of the judge to argue that mediation has always been an integral part of the legal system and that mediation *made in the USA* has no

49 See J. Laenens, above Note 33, Part 3) and A. J. De Roo and R. W. Jagtenberg, above Note 13, Part 1).

50 See N. Alexander, W. Gottwald & T. Trenczek, above Note 27, Part 2) a) viii).

51 See E. Blankenburg, Note 36 at 47 et seq. and A. J. Cannon, "Comparisons of Judicial and Lawyer Resources to Resolve Civil Disputes" (2001) 10 *JJA*, 250.

52 N. Alexander, "What's Law Got To Do With It? Mapping Modern Mediation Movements in Civil And Common Law Jurisdictions" (2001) 13 *Bond LR*, 335 at 360, 361.

53 See, for example, the mediation and conferencing models used in the Magistrates Courts in Queensland, The Queensland Building Tribunal and the Commonwealth Administrative Appeals Tribunal in Australia.

place in a civil law system. In this context, authors such as Blankenburg and Gottwald have questioned the transferability of US exports such as mediation.⁵⁴ Blankenburg, for example, argues that many civil law courts, including the German, already have the characteristics sought after in areas where common law jurisdictions are introducing non-judicial alternatives such as pre-trial conferencing.

Others argue that modern mediation is qualitatively different from judicial settlement and accordingly can be usefully integrated into existing civil law mediative structures if adopted as an additional process by judges, community conciliators and arbitrators in their existing work.⁵⁵

While modern mediation continues to establish itself as a process different from judicial settlement on the continent, the mediative elements of civil law systems continue to impact upon the development of modern mediation in those countries. So how does modern mediation extend the mediative elements of the civil law framework? In the context of common law jurisdictions moving away from the adversarial model, Galanter draws a distinction between hard non-adversarialism and soft non-adversarialism. Hard non-adversarialism embraces many features of the civil law model such as judicial case management and judicial settlement. Soft non-adversarialism favours processes, which guide parties through negotiation towards mutually beneficial outcomes with the court playing a much less interventionist role. In other words, modern mediation introduces soft non-adversarialism to the civil law world of hard non-adversarialism.⁵⁶

In a common law context Galanter's concept explains how the trend towards mediation in common law jurisdictions has been accompanied by the introduction of elements of civil law procedure such as judicial case management.⁵⁷

54 W. Gottwald, "Alternative Streitbehandlungsformen: Erprobungsspielräume für gerichtssverbundene Modellversuche" (2000) *Bremer Beiträge zur Rechtspolitik* 44.

55 A. Trossen, "Integrierte Mediation", in F. Haft & K. v. Schlieffen (eds.), *Handbuch Mediation* C.H. (Beck: Munich, 2002) at 444.

56 M. Galanter, "Dining at the Ritz: Visions of Justice for the Individual in the Changing Adversarial System", in H. Stacy & M. Lavarch (eds.), *Beyond the Adversarial System*, Federation Press, Sydney, 1999, 118 at 124.

57 See, for example, T. Sourdin, above Note 22, Part 5) and T. Sourdin, "13.4 Case Management", in 13 *Dispute Resolution, The Laws of Australia*, (Sydney: Law Book Company, 1993).

c) How is mediation being mobilised?

Whilst mediation advocates energetically promote its advantages over adjudication and arbitration, the oversupply of mediation services⁵⁸ indicates that most consumers are not using mediation unless required to do so. The mobilisation of mediation refers to mechanisms employed to encourage the use of mediation as a dispute resolution process. These include referral and filtering procedures,⁵⁹ financial incentives, education about the process and promotion of the benefits of the process. The Netherlands government, for example, has a clear goal to encourage citizens to take greater responsibility for their own conflicts through the mobilisation of mediation in the form of mandatory court related mediation initiatives and the expansion of legal aid to include mediation. These two forms of mobilisation are now considered.

In the context of legal disputes, court related mediation initiatives have been the primary vehicle for the mobilisation of mediation. At the crossroads between *out-of-court* and *in-court* dispute resolution, the judiciary and the legal profession occupy an influential position as the gatekeepers of many ADR procedures and accordingly they play a key role in the mobilisation of mediation.

Despite a great deal of debate about the legitimacy of mandatory court referrals to mediation, the reality today is that mandatory mediation cases make up the collective bulk of court related mediation in the common law and civil law worlds.⁶⁰ Indeed, Denmark first mandated mediation in civil cases in 1795 – a system, which meandered into the judicial settlement role of the civil law judge.⁶¹ Of particular interest in the context of mandatory mediation is the classical definition of mediation as a voluntary process. Legal debates on the issue aside, a number of scholars in this volume point to signs that voluntary court related mediation is attempting a comeback as a much more powerful tool than mandatory mediation to change disputing cultures. According to this argument, convincing stakeholders that mediation offers a value added quality and, in appropriate cases, is a more valuable process than trial (i) will have a far greater impact on the disputing consciousness of

58 See discussion in Part 4 a) ii) above.

59 On expanding mediation into pre-court filtering institutions, see A.J. De Roo and R.W. Jagtenberg, above Note 13.

60 See, for example, R. Birke and L. Teitz, above Note 12, Part 2 a); T. Sourdin, above Note 22, Part 1) and 5 a) i); L.A. Mistelis, above Note 10, Part 2 b) v); V. Vindeloey above Note 28, Part 6); and M. Paleker, above Note 15, Part 4 a) v).

61 See V. Vindeloey, above Note 28, Part 1).

lawyers, parties and judges than forcing them to mediate and (ii) may also reduce abuse of the mediation process. For example, in their chapter on the Netherlands, De Roo and Jagtenberg reflect on the success of nineteenth century mediation like institutions, which operated on a voluntary participation basis.⁶² Alexander, Gottwald and Trenzcek discuss the bold experiment in Germany's Lower Saxony to change the disputing culture through a comprehensive voluntary court related mediation scheme.⁶³ Conversely, Ross argues that after unsuccessful attempts to change the disputing culture, mandatory mediation may, in fact, be the key to increasing awareness and changing the dispute management culture in Scotland.⁶⁴

If one surveys the mediation landscape carefully, different shades of mandatory will emerge. Compare, for example Germany's § 15a EGZPO, which mandates mediation of all cases that meet criteria set out in the legislation with the mandatory model in the Supreme Court of Queensland Australia, according to which judges possess a discretionary power to refer matters to mediation. In the latter example, case law suggests that the judiciary should take into account the attitude of the parties to mediation and the likelihood of the parties participating in the mediation in good faith. Perhaps *soft mandatory* would suitably describe this model. Accordingly, the traditional voluntary/mandatory dichotomy is no longer an adequate tool for describing and analysing mediation developments.

Litigation cost structures in civil law jurisdictions differ in some cases from the lawyer fee per hour basis typical of common law jurisdictions. Accordingly, mediation, even where it results in a settlement, may be a more expensive process than litigation. As a result, a number of countries are debating restructuring litigation costs to ensure that mediation is more financially attractive than litigation.⁶⁵ There is a fine balance between encouraging mediation through financial incentives (such as Italy's recent company law reform introducing tax incentives for mediated settlements⁶⁶) and de-

creasing access to the courts through financial disincentives to go to court.⁶⁷ While the former promotes the use of an alternative dispute resolution process, the latter may effectively close the door to justice before the courts. Where mediation is made so financially attractive that it dramatically reduces court congestion, it may fulfil its service delivery objective. But at what cost? If the costs of a trial are so immense that once only litigants can hardly afford to go to court, then has mediation increased access to justice or effectively hindered it? What about the unintended consequences of legal aid favouring mediated settlements? Could such policies result in an increase in litigants-in-person unable to afford legal representation before the courts? Does the tendency to mandate mediation directly (for example, court referrals) and indirectly (for example, legal aid) lead to a scenario where litigation becomes an option only for the *haves*, that is repeat players and the affluent, and not for the *have-nots*? Far from being pure speculation, this scenario arguably explains the rise in litigants-in-person in the mandatory mediation jurisdiction of Queensland, Australia. Legal Aid favours mediation, as do the courts. Although the courts are no longer congested, the cost of litigating remains beyond the reach of most once-only litigants.

8. Diversity versus Consistency

For those entering or wanting to enter the mediation field, the mediation marketplace paints a confusing picture. Students of ADR frequently ask questions such as: "How do matters get to mediation? Which matters go to mediation? Who decides whether or not mediation occurs? Who attends the mediation? And who qualifies to mediate? How are fees regulated? How much? Who pays? When and where does mediation happen? What aspects of the conflict are mediated?" The answers to these questions comprise a spectrum of possibilities that reflect the inter and intra jurisdictional diversity of mediation practice. Diversity, however, exists within a mediation world that seems to be propelling itself towards institutionalisation and standardisation.⁶⁸

The tension between the desire, on one hand, for innovation and experimentation in the emerging field of mediation and the desire, on the other, for quality and consistency in mediation services comprises the essence of the

62 See A.J. De Roo and R.W. Jagtenberg, above Note 13, Part 1).

63 See N. Alexander, W. Gottwald & T. Trenzcek, above Note 27, Part 2 a) viii).

64 See M.L. Ross, above Note 33, Part 7).

65 N. Alexander, W. Gottwald & T. Trenzcek, above Note 27, Part 5 c); V. Vindeloev, above Note 28, Part 11); G. De Palo and L. Cominelli, above Note 11, Part 2 c); Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Issues Paper 20 at 113; Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Issues Paper 62 at 107.

66 G. De Palo and L. Cominelli, above Note 11, Part 2 a).

67 Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Issues Paper 20 at 115.

68 See T. Sourdin, above Note 22; N. Alexander, W. Gottwald & T. Trenzcek, above Note 27 and R. Birke and L. Teitz, above Note 12.

diversity versus consistency debate.⁶⁹ The advocates of consistency seek to establish standards to ensure an appropriate level of mediation process quality, mediator competence and a system to ensure compliance and management of complaints.⁷⁰ In other words, standards can apply to practitioners, processes and organisations. Other commentators highlight the risks of the drive towards consistency. Consistency through standardisation may threaten the diversity of mediation practice, the flexibility of the process, its cost effectiveness and accessibility.⁷¹

The diversity versus consistency debate reflects three sets of interrelated tensions.

- The tension between the trend towards regulation and institutionalisation and the desire for an unregulated community centred marketplace for mediation services (*regulatory tension*).
- The tension between the creation of one mediation profession and a variety of professions and individuals offering mediation services (*professionalisation tension*).
- The tension between a universally flexible mediation process and a structured, easily identifiable and legally certain mediation process (*process tension*).

a) The regulatory tension

Regulation is often addressed in the literature in the context of institutionalisation, juridification and legalisation of mediation. In other words, regulation through case law, legislation, industry and organisation based guidelines, government policies, court based rules and policies.⁷² The multi-door courthouse model versus the community based mediation services model inde-

69 For a thorough discussion of the opportunities and risks that the introduction of standards can create, the role that standards can play in the ADR industry and the various types of standards to be considered, see NADRAC, *A Framework for Standards: Report to the Commonwealth Attorney-General*, April 2001 at Chapter 3.

70 See, for example, the discussion on the reasons behind the *Uniform Mediation Act* in R. Birke and L. Teitz, above Note 12, Part 4).

71 See, for example, the critical comments of R. Birke and L. Teitz, above Note 12, Part 4 b).

72 On institutionalisation see T. Sourdin, above Note 22, Part 1); R. Birke and L. Teitz, above Note 12, Part 4); and L.A. Mistelis, above Note 10, Part 3 a). On juridification, see M. Deflem, "Introduction: Law in Habermas's Theory of Communicative Action", in M. Deflem, (ed.), *Habermas, Modernity and Law*, (London: Sage, 1996).

pendent of the legal system is an illustrative example of the two poles of this regulatory tug-o-war.

The mediation movement in most common law countries can be characterised by an early period of experimentation and diverse practice moving only recently towards increased regulation and institutionalisation. Conversely a number of civil law countries have moved directly to regulate mediation. For example, Prujiner points out that the provincial government in civil law Québec has greater involvement in regulating mediator accreditation than comparable bodies in the common law provinces.⁷³

Perhaps the early regulatory trend in civil law countries reflects the desire to address ADR issues on a global scale rather than maintain the developmental gap in national mediation movements. At the same time, it could also reflect the civil law culture of systems, codes, regulation and paternalistic government interventions.

In contrast, a new world political context, coupled with a flexible legal system with in-built procedures for adapting to change and a cultural mentality open to democratic and private sector service innovations, goes some way to explain the diverse nature of the development of mediation in the new world common law jurisdictions of Australia and the USA.

As the world hurtles forward in a frenzy of globalisation, one may ponder the utility of the diversity versus consistency debate. Is the outcome already a fait d'accompli?

Countries such as Australia and the USA have benefited greatly from early experimentation with mediation models and marketplace structures. It would be a mistake to assume, however, that solutions from these common law countries could be easily exported elsewhere. Indeed, despite sharing the common law system, the Australian and American responses to the diversity versus consistency debate have been dramatically different. In a move towards developing consistency, the US Model Law *Uniform Mediation Act* (UMA) was approved in May of 2001 in the hope that US states would adopt its provisions creating uniformity across jurisdictions. The US drive towards a national uniform solution reflects the vast and complicated web of regulation relating to mediators and mediation of which Birke and Teitz write that has led to a great deal of confusion about rights and obligations of the mediator, clients, lawyers and courts. However, as the Model Law represents the ultimate compromise, with certain issues such as training and

73 A. Prujiner, above Note 22, Part 4).

accreditation not canvassed at all and others dealt with very broadly, its attractiveness and utility have been the subject of much critical comment.⁷⁴

Australia, on the other hand, has continued to embrace a model which encourages diversity within regulated industries and organisations and promotes consumer awareness and choice.⁷⁵ Australia is a much smaller jurisdiction in terms of population size and number of states and diversity in mediation practice exists within all state jurisdictions. Maintaining a national perspective on state jurisdictional differences in legislation and case law is a more manageable task in Australia than in the US.

While the views of the national authors do differ on the advantages and disadvantages of gradual institutionalisation, there seems to be a general consensus that experimentation during the infancy and adolescence of the modern mediation movement allows a richness and diversity to emerge that would otherwise remain undiscovered in a market highly regulated from the start.

b) The professionalisation tension

*"As practices become professionalised they tend to "gatekeep" and not allow public scrutiny. They also tend to develop a certain culture, one of the characteristics of which, is the derogation of their clients ... it is important to reflect on the process of professionalism, who it excludes and, how it changes us in the process."*⁷⁶

While Austria is so far the only country to recognise the independent profession of mediation through an Act of Parliament,⁷⁷ Birke and Teitz comment that most people in the US mediation field will recognise mediators as professionals once they have paying clients. Attempts by one profession to monopolise mediation have not proven successful. At the same time professional tensions surrounding issues of ownership and demarcation that typically emerge alongside the development of a new field continue to play themselves out throughout the ADR world.⁷⁸ For example, the recognition of mediating as a legitimate aspect of the lawyer's professional role by German professional legal bodies resulted in a series of legal cases challeng-

ing the right of non-lawyers to mediate or advertise their mediation services in particular contexts.⁷⁹

As a matter of practice, gatekeepers have enormous influence over who mediates. Anecdotal evidence suggests that in most cases gatekeepers within the legal system will tend to refer matters to lawyer mediators and gatekeepers outside the legal system will refer to other professional mediators with whose work and disciplinary background they are familiar.

An interesting difference between common law and civil law countries that emerges in the context of training and education is the theoretically in depth and interdisciplinary focus of private mediation training in a number of civil law countries such as Austria, Germany, Switzerland and the Netherlands, not paralleled in the common law world. Many training courses are interdisciplinary, based on a multiple joint meetings model with no private sessions, and are conducted over a period of one to two years (200 hours is the standard number of contact hours required). By comparison, the predominant training model in the common law world is a single session model with caucus. Courses are conducted over a period of three to five days (20 to 40 hours). In addition to the intellectual and scientifically based approach to training and education in civil law Europe as distinct from the more pragmatic approach of common law countries, it seems that the early mediation movement in civil law Europe was so successfully resisted by the legal profession that non-lawyers began to carve a niche for themselves as mediators of disputes (particularly in family, community and victim offender matters), well before the legal profession became involved. Indeed, De Roo and Jagtenberg observe that the majority of mediation trainers in the Netherlands are psychologists.⁸⁰ Mattl and Prokop-Zischka refer to an Austrian law, which requires a co-mediation model comprising a lawyer and a psychologist mediator for certain disputes.⁸¹ Accordingly, the interdisciplinary element of training and practice in civil law countries seems well anchored in the early stages of the mediation movement.

Despite a strong interdisciplinary focus in training in civil law countries, emerging areas of mediation practice tend to mirror substantive legal categories of practice.⁸² Mediation services and training are structured around specialisations that relate to substantive legal areas rather than process – for example, environmental mediation, commercial mediation, family mediation,

⁷⁴ See R. Birke and L. Teitz, above Note 12, Part 4).

⁷⁵ T. Sourdin, Note 22, Part 2).

⁷⁶ Submission made to the National ADR Advisory Council (NADRAC) in NADRAC, *A Framework for Standard: Report to the Commonwealth Attorney-General*, April 2001 at 130.

⁷⁷ See C. Mattl and A. Prokop-Zischka, above Note 33, Part 1).

⁷⁸ For example, N. Alexander, W. Gottwald & T. Trenczek, above Note 27, Part 3 d).

⁷⁹ Above Note 78.

⁸⁰ See A. J. De Roo and R. W. Jagtenberg, above Note 13, Part 6).

⁸¹ See C. Mattl and A. Prokop-Zischka, above Note 33, Part 4 a).

⁸² See, for example N. Alexander, W. Gottwald & T. Trenczek, above Note 27.

workplace mediation and insolvency mediation. In common law countries, while many mediators develop a practice in certain areas, most do not advertise their services as relating to one practice area only. Moreover, advanced training in common law jurisdictions, while including some substantive specialisations such as family law, more typically focuses on process – for example, negotiation skills, facilitating multi-party disputes, representing clients in mediation, dispute systems design, transformative mediation, evaluative mediation and facilitative mediation.

Finally as legal regulators increasingly recognise mediation as part of role of a lawyer, so the legal profession will continue to seek to exclude non-lawyers, especially where there are legal implications for the mediation and mediated outcomes. Emerging case law, legislation and practice from countries such as Germany, Australia and the US confirms this trend.

c) The process tension

Carrie Menkel-Meadow once wrote of the many ways of mediation.⁸³ The many ways are represented by the many paradigms, models and processes of mediation practice. At one end of the spectrum transformative mediation emphasises the importance of recognition and empowerment of parties and communities, while at the other end evaluative or legal mediation focuses on rational problem solving with a mediator (often a lawyer-mediator) as content and process expert. Within the modern mediation movement there is a wide variety of models ranging from evaluative or legalistic models to facilitative (interest based) and transformative models.⁸⁴ To this list one could add the growing practice of e-mediation, which challenges many commonly held concepts of mediation.⁸⁵

Paleker comments that a lack of clear process definition leads to disparate practices.⁸⁶ Disparate practices, while reflecting the diversity of mediation, also pose challenges for quality control and the promotion of mediation amongst consumers.

Despite their differences, the many ways of mediation are part of one mediation movement. As such they are united by the search to discover the

83 C. Menkel-Meadow, "The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices" (1995) 3 *Negotiation Journal*.

84 Sourdin provides an enlightening overview of various models in her contribution on Australia, T. Sourdin, above Note 22, Part 2).

85 On e-mediation and online dispute resolution (ODR), see NADRAC, "Online ADR Background Paper" at <http://www.nadrac.gov.au/adr/ADR.html>.

86 M. Paleker, above Note 15, Part 5 d).

formula for the unique value adding quality that mediation contributes to modern dispute management. Arguably there are as many ways of mediation as there are value adding qualities of mediation and objectives for mediation schemes. Ultimately, the challenge for any legal system introducing mediation is to identify, recognise and nurture the diverse range of mediation's process qualities, while at the same time developing a consistent set of values that identify and inform the mediation process.

9. Riding the Third Wave

Dispute processing institutions do more than resolve disputes – they send messages to the community, set expectations, and both drive and reflect disputing culture. During a time where law reform rhetoric is focusing on the convergence of civil law and common law systems, mediation represents the emergence of a new form of informal and consumer oriented justice possessing a universality not typical of legal processes.

The national chapters in this book reveal how difficult it is to speak of a single mediation movement. On one hand, forms of court related mediation extend the role of the legal system beyond the strict application of the law and connect the community to the courts as part of an institutionalised vision of mediation. On the other hand, in so far as mediation is embedded independently in grass roots communities and emerging in the form of private industry based grievance procedures and the like, it represents a real shift in disputing culture and embraces a decentralised and diverse process pluralism.⁸⁷ It takes dispute management beyond the courts as envisaged by Cappelletti's third wave.

10. Conclusion

The national chapters in this book demonstrate that, with respect to structural issues in particular, common law success stories may not necessarily translate directly to civil law success stories. There is a real risk associated with an ad hoc pattern of international comparison and policy transfer in a field as new as mediation. Which success stories are likely to translate and which are not? A comprehensive understanding of both mediation and the legal, political and cultural constructs in which mediation is embedded is required to approach this question.

87 M. Galanter, above Note 55 at 127, 130.

With the global trend towards the institutionalisation of mediation, national law and legal systems will continue to exert a greater influence on the practice of mediation. Simultaneously, converse trends towards globalisation and seamless transacting require flexible dispute resolution processes that transcend national systems. In the context of such competing tensions, comparative lessons from civil and common law mediation developments provide valuable and timely conceptual challenges for the world stage.